Supreme Court, U.S.
FILED
DEC -2 1993
OFFICE OF THE CLERK

93-890

No. _____ (1)

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. MCDONNELL, ROBERT J. WARSOCKI, MICHAEL DINEEN, DON E. BRUNKEN and VERNE BEERS,

Petitioners,

v.

CITY OF OMAHA, NEBRASKA

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT V. BROOM
1722 Saint Marys Avenue
Flatiron Building, Suite 310
Omaha, Nebraska 68102
(402) 346-8323

Counsel of Record

JOHN P. FAHEY
ROBERT W. KORTUS
BROOM, JOHNSON, FAHEY AND CLARKSON
Omaha, Nebraska

Counsel for Petitioner

December 1, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

65pp

QUESTIONS PRESENTED

I. CAN EMPLOYERS AVAIL THEMSELVES OF EXEMPTIONS FROM THE OVERTIME REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT IN RESPECT TO ADMINISTRATORS OR EXECUTIVES COMPENSATED UNDER AN ACTUAL POLICY WHICH SUBJECTS COMPENSATION TO REDUCTION BECAUSE OF VARIATIONS IN THE QUANTITY OF WORK?

Petitioners answer "no."

The district court answered "no."

Seven Circuit Courts have addressed this issue with five (the District of Columbia, Second, Sixth, Seventh, and Ninth) answering "no" and two (the Eighth and Eleventh) answering "yes."

II. ARE PUBLIC EMPLOYEES ENTITLED TO THE SAME PROTECTION AFFORDED TO PRIVATE SECTOR EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT?

Petitioners answer "yes."

The district court answered "yes."

The Eighth Circuit Court of Appeals answered "no."

LIST OF PARTIES

The parties to the proceedings below were Plaintiffs-Appellees William C. McDonnell, Robert J. Warsocki, Michael Dineen, Don E. Brunken, and Verne Beers, individuals, and Defendant-Appellant City of Omaha, Nebraska, a political subdivision. They are also parties to the proceedings in this Court, and there are no additional parties.

Participating in the Eighth Circuit through the filing of *Amicus Curiae* briefs were the National Institute of Municipal Law Officers, Nebraska League of Municipalities, Minnesota League of Municipalities, National Association of County Officers, United States Conference of Mayors, National Public Employer Labor Relations Association, and the International Personnel Management Association.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. The Eighth Circuit's Decision That Employers May Subject Employees' Compensation To Reduction Because Of Variations In The Quantity Of Work And Still Retain Exemption From The Overtime Provisions Of The Fair Labor Standards Act Is In Direct Conflict With The Decisions Of Other Circuits	7
II. The Eighth Circuit's Ruling Divests Public Employees Of Protection Against The Abuse Of The Employment Relationship In Contravention Of The Decisions Of This Court	13
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).. 5, 6, 7, 9, 11

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960) 15

Atlanta Professional Firefighters Union v. Atlanta, 920 F.2d 800 (11th Cir. 1991).....10, 11

Banks v. City of North Little Rock, 708 F. Supp. 1023 (E.D. Ark. 1988) 11

Braxton v. United States, ___ U.S. ___, 111 S.Ct. 1854 (1991) 13

Curtis v. Loether, 415 U.S. 189 (1974) 13

D'Camera v. District of Columbia, 693 F. Supp. 1208 (D.D.C. 1988)..... 12

Garcia v. San Antonio Metropolitan Transportation Authority, 469 U.S. 528 (1985).....13, 14

Harris v. District of Columbia, 709 F. Supp. 238 (D.D.C. 1989)..... 12

Hawks v. City of Newport News, 707 F. Supp. 212 (E.D. Va. 1988) 11

Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981)..... 13

Kinney v. District of Columbia, 994 F.2d 6 (D.C. Cir. 1993)..... 10

Klein v. Rush-Presbyterian-St. Luke's, 990 F.2d 279 (7th Cir. 1993)..... 9

Knecht v. City of Redwood City, 683 F. Supp. 1307 (N.D. Cal. 1987)..... 12

TABLE OF AUTHORITIES – Continued

Page

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 12

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2nd Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 298 (1992) 9

McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993) 14

Mich. Ass'n. of Govt. Employees v. Mich. Corrections Dept., 992 F.2d 82 (6th Cir. 1993) 9

Mich. Supervisors' Union v. State of Mich., 826 F. Supp. 1081 (W.D. Mich. 1993) 12

Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207 (1959) 15

N.R.L.B. v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 12

Persons v. City of Gresham, 704 F. Supp. 191 (D. Or. 1988) 12

Shepoka v. Knopik, 201 Neb. 780, 273 N.W.2d 364 (1978) 14

Thomas v. Fairfax County, 803 F. Supp. 1142 (E.D. Va. 1992) 11

Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993) 11

CONSTITUTIONAL PROVISIONS:

Nebraska Constitution, Article III, section 19 .....3, 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 2201-02 4

29 U.S.C. § 207(a)(1) 3, 4

29 U.S.C. § 213(a)(1) 3, 4, 8

29 U.S.C. § 216(b) 3, 4

REGULATIONS:

29 C.F.R. § 541.1(a)-(f) (1991) 3, 4, 8

29 C.F.R. § 541.118(a) (1991) ..... *passim*

MISCELLANEIOUS:

United States Department of Wage and Hour Division, Letter Ruling dated January 15, 1986 5

56 Fed. Reg. 45,826 (Sept. 6, 1991) 6

Supreme Court Rule 10.1(a) 13

Supreme Court Rule 10.1(c) 15

No. _____

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. MCDONNELL, ROBERT J. WARSOCKI, MICHAEL DINEEN, DON E. BRUNKEN and VERNE BEERS,

Petitioners,

v.

CITY OF OMAHA, NEBRASKA

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners William C. McDonnell, Robert J. Warsocki, Michael Dineen, Don E. Brunken, and Verne Beers respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reversing the judgment of the district court and remanding the case with the direction that judgment be entered in favor of Respondent, is reported at 999 F.2d 293 and is reprinted as Appendix A at page A1 (references to the appendices bound with this Petition are styled "A___").

The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted as Appendix B at page A13.

The decisions of the United States District Court for the District of Nebraska (Strom, C.J.) have not been reported. The district court's ruling on the cross-motions for summary judgment on the issue of liability is reprinted as Appendix C at page A14. The district court's memorandum opinion on the issue of damages is reprinted as Appendix D at page A19. The final order of the district court is reprinted as Appendix E at page A27.

JURISDICTION

The decision of the Court of Appeals was filed on July 2, 1993. The order denying the petition for rehearing and suggestion for rehearing en banc was entered September 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 207(a)(1) is reprinted as Appendix F at page A29.

29 U.S.C. § 213(a)(1) is reprinted as Appendix G at page A30.

29 U.S.C. § 216(b) is reprinted as Appendix H at page A31.

29 C.F.R. § 541.1(a)-(f)[1] is reprinted as Appendix I at page A33.

29 C.F.R. § 541.118 is reprinted as Appendix J at page A35.

Nebraska Constitution, Article III, section 19 is reprinted as Appendix K at page A40.

STATEMENT OF THE CASE

1. This is an action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et. seq.* The plaintiffs, now petitioners, are present or former assistant fire chiefs of the City of Omaha, Nebraska ("assistant chiefs"). The assistant chiefs allege they are covered by the Fair Labor Standards Act ("FLSA") and that the Respondent, City of Omaha, Nebraska, ("City of Omaha") failed to compensate them for overtime work in violation of 29 U.S.C.

[1] The district court applied the 1991 version of the regulations.

§ 207. The complaint sought a declaration that the assistant chiefs are entitled to overtime compensation plus back pay, liquidated damages, and attorneys' fees.[2]

2. The United States District Court for the District of Nebraska was presented with cross-motions for partial summary judgment on the issue of whether the assistant chiefs are exempt from FLSA overtime pay requirements. Citing 29 U.S.C. § 213(a)(1) and 29 C.F.R. §§ 541.1, 541.2, the district court observed that executive and administrative employees, such as the assistant chiefs, are exempt from FLSA overtime provisions if they meet a duties test and are compensated for their services on a salary basis.

The City of Omaha contended that the assistant chiefs were exempt because of the supervisory nature of their duties.

The assistant chiefs conceded the supervisory nature of their duties but averred that the duties test is only one prong of a two-part test. The assistant chiefs then presented evidence that they were not paid on a salaried basis.[3]

---

[2] Employees may seek these remedies pursuant to 28 U.S.C. §§ 2201-02 and 29 U.S.C. § 216(b).

[3] At this stage, the only evidence before the district court on the salary portion of the test was a stipulation that each of the assistant chiefs received an annual salary of at least $56,114 and the following from plaintiff McDonnell's affidavit:

> When Plaintiffs or other members of the Fire Division are absent from work for less than a day, the hours they are absent are subject to deduction from their wages unless the employees are able to use annual leave, sick leave or other leave with pay entitlement

Relying upon the Ninth Circuit's interpretation of 29 C.F.R. § 541.118(a), see *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) and a United States Department of Wage and Hour Division, Letter Ruling dated January 15, 1986, the district court determined that in order to satisfy the salary test, an employee's pay cannot be subject to deductions for absences of less than a day. The district court found that the City of Omaha did not dispute that the assistant chiefs are subject to a reduction in pay for absences of less than a day. Therefore, the district court held that the assistant chiefs were not paid on a salary basis and were not exempt from FLSA protection.

3. Following a trial to the bench on stipulated facts, the district court resolved the issue of damages. The district court computed the amount of uncompensated scheduled and unscheduled overtime and back pay due and then addressed the propriety of liquidated damages. On this issue, the City of Omaha offered the stipulation of the parties that the assistant chiefs never lost pay for taking absences of less than a day, electing instead to suffer deduction in the benefit of paid leave.

In awarding liquidated damages, the district court found no good faith belief that the City of Omaha was in

---

(e.g., "funeral leave"). If, for example, the employee absents himself from work, for less than a day, to handle personal affairs, the amount away from the job would be subject to wage deduction. This is the policy of the City of Omaha and has been the policy during the period relevant to this cause of action.

compliance with the FLSA and observed that the stipulation "does nothing more than establish that rather than being forced to take leave without pay, the [assistant chiefs] had available to them an option of using accumulated annual time." Appendix D at A25. Underlying this finding were the additional holdings that the policy of the City of Omaha unmistakably subjected the pay of the assistant chiefs to reduction; this reduction violates the FLSA; and, "[i]t was only through mere providence that [the assistant chiefs] fortunately had sufficient annual leave to prevent an actual diminution in their pay." *Id.*

The district court noted that an interim regulation was promulgated on September 6, 1991 and was specifically designed to ameliorate state and local governments of the effects of the *Abshire* decision. 56 Fed. Reg. 45,826 (Sept. 6, 1991). The regulation provided that deductions from accrued personal leave and sick leave for absences of less than a day do not defeat an employee's exemption from the FLSA. The district court also noted that the regulation could not be applied retroactively.

4. On appeal the Eighth Circuit determined that the district court had incorrectly applied the salary-basis test set forth in 29 C.F.R. § 541.118(a). The panel focused on whether the compensation of the assistant chiefs was subject to reduction for absences of less than a day. Because the assistant chiefs suffered no actual deduction in pay (having voluntarily elected to use accrued leave time to cover prior absences of less than a day), the Eighth Circuit held that the pay of the assistant chiefs was subject only to a contingent deduction and not an

actual reduction as required under its interpretation of § 541.118(a).

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision That Employers May Subject Employees' Compensation To Reduction Because Of Variations In The Quantity Of Work And Still Retain Exemption From The Overtime Provisions Of The Fair Labor Standards Act Is In Direct Conflict With The Decisions Of Other Circuits.

Seven Circuits have addressed the question whether provisions of federal law governing exemptions to the overtime provisions of the FLSA for executive, administrative, and professional employees prohibit either (i) policies which subject pay to deduction because of variations in the quantity or quality of work or (ii) actual diminishments in pay for such variations. Five circuits (the District of Columbia, Second, Sixth, Seventh, and Ninth) have decided that a policy which subjects pay to deduction does not satisfy the salary test of 29 C.F.R. § 541.118(a). Two circuits (the Eighth and Eleventh) hold that under this regulation the challenged policy must actually result in a diminishment of pay before an exemption is lost. There is also a conflict among the district court decisions on this issue.

The issue was first addressed by the Ninth Circuit in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). Under the FLSA and the regulations which implement it, "bona fide executives" are not exempt from overtime provisions unless those

employees are paid on a salary basis. 29 U.S.C. § 213(a)(1), 29 C.F.R. § 541.1(a)-(f). The Ninth Circuit held that certain fire department executives were not paid on a salary basis under 29 C.F.R. § 541.118(a). This regulation provides:

> An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

The challenged policy of the fire department subjected executives' pay to a potential deduction for absences of less than a day if the absences could not be covered by vacation time, sick leave, or accrued time off.

In finding that this policy did not comport with § 541.118(a), the Ninth Circuit noted that the purpose of this regulation is to distinguish salaried employees from hourly employees. Bona fide executives manage their own time; they do not punch a time clock, and are compensated for the general value of their services not each and every increment of time those services are performed. 908 F.2d at 486. "Subjecting an employee's pay to deductions for absences as short as an hour, is completely antithetical to the concept of a salaried employee." *Id.*

The County argued that despite the fact that the policy subjected pay to deductions for partial-day absences, no such deductions were actually made. The Ninth Circuit found this fact to be both misleading and irrelevant; under the "subject to" language of § 541.118(a) "[e]ither pay is fixed and immutable, and not subject to such deductions, or it is contingent." 908 F.2d at 487.

The Second Circuit adopted the reasoning of *Abshire* in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 298 (1992).

The Seventh Circuit recognized that the circuits were divided and employed the above Ninth and Second Circuit opinions in holding that pay which could be reduced on the basis of quantity or quality of work does not meet the salary test under § 541.118(a), regardless of whether a diminishment in pay actually unfolds. *Klein v. Rush-Presbyterian-St. Luke's*, 990 F.2d 279, 284-86 (7th Cir. 1993). "The plain meaning of the ["subject to reduction"] language suggests that it is enough that a deduction could have been made for an impermissible reason." 990 F.2d at 286.

In *Mich. Ass'n. of Govt. Employees v. Mich. Corrections Dept.*, 992 F.2d 82 (6th Cir. 1993) (per curiam), the Sixth Circuit also followed the lead of the Ninth and Second Circuits in holding that the proper focus is on the actual policy as opposed to how that policy has been administered. Two reasons were cited in support of this holding: First, this approach is more consistent with the unambiguous language of § 541.118(a) and the nature of salaried employment. 992 F.2d at 86. Second, "focusing on the actual policy is more practical and realistic." *Id.*

The Circuit Court of Appeals for the District of Columbia held likewise in *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993). In so holding, the court observed that "[t]he application of § 541.118(a) to governmental employers has given rise to a sharp split in decisions, both between the district judges in this circuit and between circuits." 994 F.2d at 11 (citations omitted). The court concluded that the regulatory phrase "subject to reduction" simply "means what it says." *Id.* at n4. The court further observed that there is no prerequisite of actually docking pay under the test; subjecting pay, even theoretically, to docking for absences of less than a day is not permissible.

There is, of course, a divergence of authority among the circuit courts. In *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991) the Eleventh Circuit rejected the contention of the firefighters' union that certain executives should not be exempt from the overtime provisions of the FLSA.

Atlanta is a split decision wherein two members of the panel succinctly held:

> The Union argues that because a city ordinance requires that all city employees' compensation be decreased for arriving late or for violating other . . . regulations, the captains cannot, as a matter of law, qualify for the administrative exemption. As the district court noted, however, the Union presented no evidence to prove that any captain ever suffered a reduction in pay for any of the reasons stated. Accordingly, we conclude that the City has demonstrated that a

> captain's pay is not subject to reduction because of the quality or quantity of work.

920 F.2d at 805.

In the court below, the Eighth Circuit rejected what it labeled as the *Abshire* approach, adopted *Atlanta*, and determined that the salary test is satisfied if no money was ever deducted on the basis of the quantity of work performed regardless of any contingencies in the employment agreement or compensation policy. In support of its holding, the court ambiguously suggested that there are public policy concerns which justify dissimilar treatment for public employees.

Throughout the nation the federal district courts have also looked at the same regulatory provision and have reached different conclusions as to what is required. Recognizing that the ensuing decisions may be subject to either prior or subsequent authority from their respective circuits, the majority holding of the circuits was echoed in the following cases: *Yourman v. Dinkins*, 826 F. Supp. 736 (S.D.N.Y. 1993) (salary test does not require actual deductions be made, but speaks in terms of possibility and susceptibility); *Thomas v. Fairfax County*, 803 F. Supp. 1142 (E.D. Va. 1992) (express terms of the regulation and clear weight of authority do not require an employee to show any actual reduction); *Banks v. City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988) (no showing of actual deductions is needed); *Hawks v. City of Newport News*, 707 F. Supp. 212, 215 (E.D. Va. 1988) ("[I]t is the defendant's policy which is under attack in a suit brought under the FLSA. The fact that the policy has not been applied to a particular group of employees does not alter the policy

itself."); *Persons v. City of Gresham*, 704 F. Supp. 191 (D. Or. 1988) (pay is subject to deduction even if no deduction actually taken); *D'Camera v. District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988) (test is whether pay is subject to a deduction, not the frequency with which pay is actually reduced); *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987) ("That no fire captain actually had his pay reduced as a result of a short-term absence since April 15, 1986 does not alter the undisputed fact that fire captains' paychecks are subject to 'reduction' for such absences.")

With the same proviso as above, the following decisions fall in line with the Eighth and Eleventh Circuits: *Mich. Supervisors' Union v. State of Mich.*, 826 F. Supp. 1081 (W.D. Mich. 1993) (a theoretical possibility of deduction for absences of less than a day does not violate the salary test); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989) (same).

"Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeals.'" *N.R.L.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

The split among the circuit and district courts has resulted in a lack of uniformity in the nation's courts on the meaning of an important provision of federal law.

Resolving conflicts among the circuit courts is a "principal purpose for exercising the Court's certiorari jurisdiction." *Braxton v. United States*, ___ U.S. ___, 111 S.Ct. 1854, 1857 (1991). Conflict among the district courts is an important consideration as well. *See Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 646 n.9 (1981); *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974).

The threshold of Supreme Court Rule 10.1(a) has been met; this case involves "a United States court of appeals [which] has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." Congress and the Department of Labor have done nothing to resolve the divergence of opinion which has split the circuits. The petition for certiorari should be granted as guidance from this Court is needed.

II. The Eighth Circuit's Ruling Divests Public Employees Of Protection Against The Abuse Of The Employment Relationship In Contravention Of The Decisions Of This Court.

A core element of the FLSA is the forty-hour work week – a goal grounded in economic policy, the safety of this nation's employees and their quality of life. Provisions requiring additional compensation for work in excess of that time period serve as a significant deterrent to the abuse of the employment relationship and protect public as well as private employees. *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985).

The decision of the Eighth Circuit seeks to drive a wedge between the protection available to public employees and that afforded to employees of the private

sector. There is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to the City of Omaha, that is *destructive of state sovereignty or violative* of any state or federal constitutional provision.

The Eighth Circuit cited to Article III, section 19 of the Nebraska Constitution and inferred that this provision prohibits overtime payments to public employees. 999 F.2d at 297. The constitutional provision applies to all public employees in the state; the Eighth Circuit implies that all public employees in Nebraska may lose any claim to overtime compensation in spite of the FLSA and this Court's decision in *Garcia*.

Additionally, the Eighth Circuit's interpretation runs afoul of the reading of that provision by Nebraska's highest court. *See Shepoka v. Knopik*, 201 Neb. 780, 273 N.W.2d 364 (1978) (the constitutional prohibition against increasing or diminishing compensation of a public officer relates only to legislative changes). There is no legislative change at issue in this proceeding.

Whether private or public, salaried executives as a class are compensated for the value of their service not for each increment of time spent performing that service. Whether private or public, employees treated like hourly employees in their compensation are entitled to avail themselves of the protection afforded to them under the FLSA. This Court should carefully scrutinize any attempt to chip away at the decision in *Garcia* to extend to public employees the protection of the FLSA.

This Court has held that all exemptions to the FLSA, must be narrowly construed in order to further Congress' goal of providing broad federal employment protection.

Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211 (1959). "Employers have the burden of proving that the exemption applies, and they must demonstrate that their employees fit plainly and unmistakably within [the exemption's] terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

The Eighth Circuit has contravened these dictates by expanding the exemption for "bona fide executives" as opposed to applying a narrow construction. This has been accomplished by taking the plain and unmistakable language of 29 C.F.R. § 541.118(a) and recasting it so that under the salary test a showing is now required that an employee's pay has been actually diminished on the basis of variations in quantity or quality of work.

This case involves a federal question decided in a way that conflicts with applicable decisions of this Court. *See* Supreme Court Rule 10.1(c).

CONCLUSION

For all these reasons, the petition for certiorari should be granted.

Respectfully submitted,

ROBERT V. BROOM
1722 Saint Marys Avenue
Flatiron Building, Suite 310
Omaha, Nebraska 68102
(402) 346-8323

Counsel of Record
For Petitioners William C. McDonnell, Robert J. Warsocki, Michael Dineen, Don E. Brunken, and Verne Beers

JOHN P. FAHEY
ROBERT W. KORTUS
BROOM, JOHNSON, FAHEY, AND CLARKSON
1722 Saint Marys Avenue
Flatiron Building, Suite 310
Omaha, Nebraska 68102
(402) 346-8323

Counsel for Petitioners

December 1, 1993

APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Eighth Circuit A1

Appendix B – Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc A13

Appendix C – Memorandum and Order of the United States District Court for the District of Nebraska A14

Appendix D – Memorandum Opinion of the United States District Court of the District of Nebraska A19

Appendix E – Order of the United States District Court for the District of Nebraska A27

Appendix F – 29 U.S.C. § 207 ..... A29

Appendix G – 29 U.S.C. § 213 ..... A30

Appendix H – 29 U.S.C. § 216 ..... A31

Appendix I – 29 C.F.R. § 541.1(a)-(f) A33

Appendix J – 29 C.F.R. § 541.118 ..... A35

Appendix K – Nebraska Const., Art. III, Sec. 19.... A40

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-3073

William C. McDonnell; Robert J. Warsocki; Michael Dineen; Don E. Brunken; Verne Beers,

Plaintiffs – Appellees,

v.

City of Omaha, Nebraska,

Defendant – Appellant.

National Institute of Municipal Law Officers; Nebraska League of Municipalities; Minnesota League of Municipalities; National League of Cities; National Association of County Officers; United States Conference of Mayors; National Public Employer Labor Relations Association; International Personnel Management Association,

Amici Curiae.

Appeal from the United States District Court for the District of Nebraska.

Submitted: March 15, 1993

Filed: July 2, 1993

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The City of Omaha, Nebraska, appeals from summary judgment entered against it on claims filed by William C. McDonnell, Robert J. Warsocki, Michael Dineen, Don E. Brunken, and Verne Beers, all assistant fire chiefs of the Omaha Fire Division. The chiefs sought a declaratory judgment that they were entitled to overtime wage benefits specified in sections 201-219 of the Fair Labor Standards Act. 29 U.S.C. §§ 201-219 (1988 and Supp. III 1991). The City contended that the chiefs were not entitled to these overtime benefits because the chiefs were employed in an executive or administrative capacity, and therefore, exempt from the Act's overtime provisions under 29 U.S.C. § 213(a) (1). The district court rejected this argument, applying regulations which establish a duties and salary test to determine whether an employee is a bona fide executive. *See* 29 C.F.R. § 541.1(a)-(f) (1991).[1] The district court concluded that the City failed to meet the salary test because the chiefs' pay was subject to reduction for absences of less than a day for personal reasons, sickness, or disability. On appeal, the City argues that the district court incorrectly applied the salary test, and that the mere possibility of salary reduction is insufficient to prevent an employee from being a salaried

---

[1] The district court applied the 1991 version of the regulations.

executive. We reverse and remand for entry of judgment in favor of the City.

In general, the FLSA requires employers to pay overtime compensation for hours worked in excess of a 40-hour work week. *See* 29 U.S.C. § 207. The FLSA, however, exempts from overtime pay provisions "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). An employee may qualify for the executive exemption if the employee meets both the "duties" and "salary" requirements set forth in 29 C.F.R. § 541.1(a)-(f). The regulations define a "bona fide executive" as an employee with supervisory duties who is paid on a salaried basis. *Id.* The test for whether an employee is paid on "a salary basis" is set out at 29 C.F.R. § 541.118(a) (1991):

> An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

The primary function of assistant fire chief is to serve as the administrative and supervisory head of the fire division. The chiefs supervise between 10 and 200 individuals and participate in hiring, firing, and promotional

decisions. The chiefs admit the supervisory nature of their duties.

The chiefs claim that they do not qualify as bona fide executives because they are not paid on a salaried basis. The city pays the chiefs (on a bi-weekly basis) an annual salary of $56,114 or more. The City has determined that a 28-day work cycle is conducive to the operational needs of the fire department. The chiefs claim that anytime they are required to work in excess of 212 hours within a given 28-day work cycle, they are entitled to overtime compensation under the FLSA. The basis for the chiefs' claim is contained in the following passage from McDonnell's affidavit:

> When Plaintiffs or other members of the Fire Division are absent from work for less than a day, the hours they are absent are subject to deduction from their wages unless the employees are able to use annual leave, sick leave or other leave with pay entitlement (e.g., "funeral leave"). If, for example, the employee absents himself from work, for less than a day, to handle personal affairs, the amount away from the job would be subject to wage deduction. This is the policy of the City of Omaha and has been the policy during the period relevant to this cause of action.

Both sides filed summary judgment motions. The district court looked to the FLSA regulations, and concluded that the City's scheme of compensation violated the salary basis test set forth in 29 C.F.R. § 541.118(a). *McDonnell v. City of Omaha*, No. CV90-0-17, slip op. at 3 (D. Neb. June 17, 1991). The district court relied on a 1986

Department of Labor letter ruling which stated that salary deductions "for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with section 541.118(a) (2) and (3)," and on a Ninth Circuit decision, *Abshire v. County of Kern*, 908 F.2d 483, 486-90 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), ruling that a similar pay policy was inconsistent with salaried status. *Id.* The district court granted partial summary judgment in favor of the chiefs.

The parties then tried the issue of damages on stipulated facts. The district court first held that a new interim regulation promulgated on September 6, 1991, was not retroactive because it was substantive in nature and designed to stem any accrual of "additional" liability to state and local governments. *McDonnell v. City of Omaha*, No. CV90-0-17, slip op. at 3 (D. Neb. Aug. 11, 1992). The regulation provided that deductions from accrued personal leave and sick leave for absences of less than one day do not preclude an employee from being considered a bona fide executive. 56 Fed. Reg. 45,826 (Sept. 6, 1991). On the issue of liquidated damages, the court accepted a stipulation that the assistant chiefs never actually lost pay as a result of their absences for less than a day because the chiefs (like other city employees) could use their accumulated paid leave to cover these absences. The district court nevertheless awarded backpay and liquidated damages, and the City appeals.

The City argues that the district court incorrectly applied the salary test, and that the mere possibility of deductions from pay for short absences when an employee lacks accumulated paid leave is insufficient to prevent an employee from being considered a salaried

executive. The City further argues that the district court misconstrued a deduction of compensatory benefits as a deduction against salary, and that public policy requires reversal.[2]

Exemptions to the FLSA must be narrowly construed in order to further Congress' goal of providing broad federal employment protection. *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959); *Abshire*, 908 F.2d at 485. Employers have the burden of proving that the exemption applies, and they must demonstrate that their employees fit "plainly and unmistakably within [the exemption's] terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). We review the district court's grant of summary judgment de novo to determine whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The City first argues that an employee should not lose exempt status merely because the employee may lose pay for absences from work of less than one day. The chiefs urge us to reject the City's argument because the City failed to present any evidence that it paid the chiefs on a salary basis. The chiefs point out that the record before the district court was quite limited, and that it

---

[2] The National League of Cities, the National Association of County Officers, the United States Conference of Mayors, the National Public Employer Labor Relations Association, and the International Personnel Management Association filed an amici curiae brief in support of these arguments.

contained no evidence that the chiefs did not suffer a loss of pay until the parties filed stipulations after the court's original order granting summary judgment.

The City filed an affidavit in the district court stating that it paid each chief an annual salary of $56,114 or more. The chiefs filed an affidavit stating that when they were absent from work for less than a day, their compensation was "subject to deduction . . . unless [they] are able to use annual leave, sick leave, or other leave with pay entitlement." The regulation specifically defines a salaried employee as one whose compensation "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). The evidence in the record establishes that the City paid the chiefs a predetermined amount, and this amount was not reduced for part days missed from work *unless* the employee had no accumulated paid leave time. For the reasons more fully discussed below, we do not believe that a contingent deduction in pay defeats salaried status. The affidavit filed by the chiefs adds a contingency that was in the record before the district court entered partial summary judgment. Moreover, the stipulation that the chiefs suffered no actual loss of pay was presented to the district court before it entered final judgment, and is part of the district court record. Fed. R. App. P. 10(a).

In interpreting the salary basis test, the district court followed the Ninth Circuit's reasoning in *Abshire*, 908 F.2d at 483. In *Abshire*, the Ninth Circuit reversed the district court's holding that county battalion fire chiefs were bona fide executives exempt from the overtime provisions of the Act, ruling that the fire chiefs were not

salaried employees because their pay was subject to reduction for absences of less than a day when they had no accrued or compensatory leave. *Id.* at 484, 486. Reasoning that pay is either "fixed and immutable, and not subject to such deductions, or it is contingent," the court held that employees whose pay could be reduced for absences are not salaried, even if the employer has not actually made any deductions.[3] *Id.* at 487. The Second Circuit and the D. C. Circuit followed *Abshire* in *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992), and in *Kinney v. District of Columbia*, No. 91-7164, 1993 U.S. App. Lexis 12802 (D.C. Cir. June 1, 1993). The Sixth Circuit similarly followed this line of reasoning from *Abshire* in *Michigan Association of Governmental Employees v. Michigan Department of Corrections*, 992 F.2d 82 (6th Cir. 1993) (per curiam), although it concluded that the case was distinguishable on its facts. *Id.* at 85-86.

Although the City's pay system is similar to that in *Abshire*, the systems are factually distinguishable. In *Abshire*, the county paid battalion chiefs overtime pay for every tenth of an hour they worked beyond their regularly scheduled work hours, and usual hourly rates for their attendance at training activities outside of their work shifts. 908 F.2d at 485. This policy alone, the Ninth

---

[3] Several district courts have similarly held that the possibility of deductions defeats executive status. *See, e.g., Banks v. City of North Little Rock*, 708 F. Supp. 1023, 1025 (E.D. Ark. 1988); *Hawks v. City of Newport News*, 707 F. Supp. 212, 215 (E.D. Va. 1988); *Persons v. City of Gresham*, 704 F. Supp. 191, 194 (D. Or. 1988); *Knecht v. City of Redwood City*, 683 F. Supp. 1307, 1311 (N.D. Cal. 1987).

Circuit observed, is inconsistent with salaried status. *Id.* at 486; *see also Kinney*, 1993 U.S. App. LEXIS 12802, *11 n.3 (policy of overtime compensation also inconsistent with salaried status); *Klein v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 990 F.2d 279, 284 (7th Cir. 1993) (fact that employee's supervisors were not subject to compensation time policy defeats salaried status). In our view, the overtime compensation policy in *Abshire* severely limits its persuasive weight. The City does not have such an overtime compensation policy here; the chiefs are paid a predetermined amount regardless of hours worked.

The Eleventh and Fifth Circuits have not followed *Abshire*. In *Atlanta Professional Firefighters v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991), the City of Atlanta had an ordinance requiring that the City dock the pay of fire captains if they were late or violated certain rules. *Id.* at 805. The Eleventh Circuit concluded that an actual deduction must be shown before the exemption is lost. *Id.* The court reasoned that because the union presented no evidence that any captain ever suffered a loss in pay, the City met its burden of proving that the captains' pay was not subject to reduction based on the quality or quantity of their work. *Id.* Likewise, the Fifth Circuit in *York v. City of Wichita Falls*, 944 F.2d 236 (5th Cir. 1991), considered a pay situation similar to that here, and reversed the district court's order entering summary judgment, concluding that there was a question of fact as to whether the fire captains and battalion chiefs were salaried employees. *Id.* at 242. The court stated that executive status would not necessarily be defeated if the City did not actually take the salary deductions. *Id.* Our holding is consistent with that of these two courts.

The D.C. and Sixth Circuits criticized *Atlanta Professional Firefighters,* concluding that the regulation focuses on whether the employees pay *can be* docked, not whether their pay actually is docked. *See Kinney,* 1993 U.S. App. at *13; *Michigan Ass'n of Gov'tl Workers,* 992 F.2d at 85-86. We, however, do not read the "subject to" language of the regulation to mean that a "possible" or "contingent" reduction in salary automatically means that pay is "subject to reduction," and in violation of the salary basis test. The *Abshire* approach does not persuade us. The letter ruling quoted in *Abshire* and relied on by the district court states only that deductions from pay for absences of less than a day are inconsistent with section 541.118. *See* 908 F.2d at 486. The chiefs admit that a salary deduction occurs only if they have no available paid leave time. Thus, any salary deduction is contingent on the chiefs having no available paid leave time. The policy here is leave offsetting leave; there is no salary reduction unless an employee exhausts his leave time. There are other Department of Labor, Wage, and Hour Division letter opinions that relate specifically to public employers and provide guidance. In 1987, the Wage and Hour Division adopted a nonenforcement policy for public employers who use accumulated leave time to offset short absences. The Division stated that an exemption would not be denied to an otherwise exempt public employee whose pay is reduced for short absences because the employee has exhausted his available paid leave. U.S. Department of Labor, Wage, and Hour Division, Letter Ruling of January 9, 1987. With respect to absences for collective bargaining, an employer can require an employee to substitute paid leave for such

absences without losing the exemption. U.S. Department of Labor, Wage, and Hour Division, Letter Ruling of July 17, 1989. These letter opinions demonstrate the administrative interpretation of the regulations before us. Moreover, the salary basis test was promulgated long before the FLSA applied to public employees[4] and the Ninth Circuit's strict interpretation of the salary basis test fails to consider the difference between public and private sector employees. Of most relevance are statutory and constitutional provisions that prohibit payment of increased compensation after the services have been rendered, such as Article III, section 19, of the Nebraska Constitution.

The district court for the Eastern District of Virginia also differed with *Abshire* in *Fire Fighters Local 2141 v. City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990). In that case, the district court concluded that the docking of accrued compensatory leave time for short absences would not defeat salaried status. *Id.* at 1232. The court reasoned "[w]hile personal leave, sick leave and/or compensatory time may be part of an employee's compensation package, it does not constitute salary." *Id.* The court in that case also relied on the July 17, 1987, Department of Labor letter ruling which we have referred to above which states "that while deductions in salary are not permitted for absences of less than

---

[4] In 1974, Congress first tried to extend the FLSA to state and local governments, and the Supreme Court declared the law unconstitutional. *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Supreme Court later reversed *Usery* in *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985).

a day, an employer may require an employee to substitute paid leave for such absences without losing the exemption." *Id.* The Virginia district court's reasoning and the letter rulings which we have referred to above are persuasive.

The record before the district court is such that the judgment in favor of the chiefs must be reversed and judgment entered in favor of the City.

We reverse the district court's judgment, and remand with directions that judgment be entered in favor of the City of Omaha.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3073NEO

William C. McDonnell, et al.,	*	
Appellees,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
City of Omaha, Nebraska,	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

September 3, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

WILLIAM C. McDONNELL, et al., Plaintiffs, v. CITY OF OMAHA, Defendant.	CV. 90-0-17 MEMORANDUM AND ORDER

This matter is before the Court on plaintiffs' motion for partial summary judgment (Filing No. 5) and defendant's motion for summary judgment (Filing No. 21). Jurisdiction of the Court is premised upon 28 U.S.C. §§ 1331, 1337.

This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 and for compensation pursuant to the overtime wage provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* [hereinafter "FLSA"]. Plaintiffs are four members of the Omaha Fire Division presently or formerly holding the rank of Assistant Fire chief. Plaintiffs allege that they are entitled to the rights and benefits under the FLSA, including the overtime wage benefits specified in 29 U.S.C. § 207.

The City does not dispute that § 207 of the FLSA provides, in general, that work hours performed over a statutory maximum number in any given week must be compensated at overtime rates. The City contends, however, that at all times relevant to this action, plaintiffs

were employed with the City in either an executive or administrative capacity, as those terms are used in 29 U.S.C. § 213(a)(1), and are exempt from FLSA overtime pay provisions. The FLSA exempts executive and administrative employees from the Act's overtime provisions provided the employee performs executive or administrative duties and is paid on a salary basis. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.1; 29 C.F.R. § 541.2.

For purposes of their summary judgment motion, plaintiffs ask the Court to assume that they perform executive or administrative duties. Plaintiffs contend, however, that because the City deducts pay for their unpaid absences of less than a day, they are not salaried employees within the meaning of the FLSA, and the City is not in compliance with § 207, or the relevant Department of Labor regulations, 29 C.F.R. §§ 541.1, 541.118(a)(2)-(3).

Summary judgment is proper if there is no genuine issue of material fact and the moving party should prevail as a matter of law. Fed. R. Civ. P. 56(c). Upon review of a motion for summary judgment, this Court must give the party opposing the motion the benefit of all favorable factual inferences. *Holloway v. Lockhart*, 813 F.2d 874, 878 (8th Cir. 1987).

Exemptions to the FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959). Employers who claim that an exemption applies to their employees not only have the burden of proof, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Sutton*

v. Engineered Systems, Inc., 598 F.2d 1134, 1136 (8th Cir. 1979), but they also must demonstrate that the employees fit "plainly and unmistakenly within [the exemptions] terms." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). *See also D'Camera v. District of Columbia*, 693 F.Supp. 1208, 1213 (D.D.C. 1988).

The administrative regulations promulgated pursuant to the FLSA establish a "duties test" and a "salary test" for determining whether an employee is a "bona fide executive" or a "bona fide administrator." *See* 29 C.F.R. § 541.1(a)-(e); 29 C.F.R. § 541.1(f); 29 C.F.R. § 541.2(a)-(d); 29 C.F.R. § 541.2(e). "Generally, in order to claim an exemption, an employer must prove that the employee meets both tests." *Abshire v. County of Kern*, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied.*, 59 U.S.L.W. 3501 (1991).

As plaintiffs ask the Court to assume the City has satisfied its burden with respect to the "duties" test, the Court need only determine whether the evidence establishes that the plaintiffs meet the "salary" test. In order to satisfy the salary test, an employee's pay cannot be subject to deductions for absences of less than a day. *Abshire*, 908 F.2d at 486. "The Department of Labor has stated that 'deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3).' " U.S. Department of Labor, Wage & Hour Division, Letter Ruling of January 15, 1986 (*quoted in Abshire*, 908 F.2d at 486).

In *Abshire,* the Court stated:

> Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the . . . quantity of work performed" – especially when hourly increments are at issue.

Abshire, 908 F.2d at 486.

The City does not dispute that plaintiffs are subject to a reduction in pay for absences of less than a day. This scheme of compensation simply does not comport with the requirements of 29 C.F.R. § 541.118(a). The Court concludes that the City has failed to establish that plaintiffs are exempt from the FLSA overtime provisions. Accordingly, plaintiffs are entitled to overtime compensation pursuant to the FLSA and the regulations promulgated thereunder. The Court will grant plaintiff's motion for partial summary judgment, with the determination of the precise amount of overtime compensation to which plaintiffs are entitled to wait until trial. The progression order shall remain in full force and effect.

IT IS ORDERED:

1) Plaintiffs' motion for partial summary judgment is granted, and judgment is entered as follows:

a) Plaintiffs are not executive or administrative employees within the meaning of 29 C.F.R. § 541.1 and 29 C.F.R. § 541.2 and, as such, are entitled to overtime compensation pursuant to 29 U.S.C. § 207.

b) This case shall be progressed for trial in accordance with the progression schedule previously entered to determine the amount of plaintiffs' recovery for overtime pay due them.

2) Defendant's motion for summary judgment is denied.

DATED this 17th day of June, 1991.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States
District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

WILLIAM C. McDONNELL, et al.) Plaintiffs, v. CITY OF OMAHA, Defendant.	CV. 90-0-17 MEMORANDUM OPINION (Filed Aug. 11, 1992)

This matter is before the Court following a trial to the Court on a stipulated set of facts. Pursuant to Fed. R. Civ. P. 52, the court makes the following findings of fact and conclusions of law.

Plaintiffs Robert J. Warsocki, Michael P. Dineen, Verne G. Beers, and William C. McDonnell[1] brought this action for declaratory judgment pursuant to 28 U.S.C. § 2201, and for compensation pursuant to the overtime wage provisions of the Fair Labor Standards Act, 29 U.S.C. § 29 U.S.C. 201, *et seq.* (hereinafter "FLSA"). Plaintiffs are four members of the Omaha Fire Division, presently or formerly holding the rank of Assistant Fire Chief. Plaintiffs alleged that they were entitled to rights and benefits under the FLSA, including the overtime wage

---

[1] Although the stipulations submitted as evidence by the parties address numerous persons, only four individuals were made parties to this action. *See* Exhibit A attached to Filing No. 17.

benefits specified in 29 U.S.C. § 701. Jurisdiction of the Court is predicated upon 28 U.S.C. §§ 1331, 1337.

On June 17, 1991, the Court granted plaintiffs' motion for partial summary judgment, concluding that plaintiffs were not executive or administrative employees within the meaning of 29 C.F.R. § 541.1 and 29 C.F.R. § 541.2, because the City subjected plaintiffs' pay to deductions for absences of less than a day. *See* 29 C.F.R. § 541.1(a)-(e); 29 C.F.R. § 541.1(f); 29 C.F.R. § 541.2(a)-(d); 29 C.F.R. § 541.2(e). *See also Abshire v. County of Kern*, 908 F.2d 483, 484 (9th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3501 (1991).

The issues presently before the Court are as follows: (1) the amount of overtime pay due to the plaintiffs for hours worked in excess of the hourly maximum between April 15, 1986, and September 6, 1991; (2) whether plaintiffs are entitled to liquidated damages or whether the City of Omaha acted in good faith and had reasonable grounds for believing that plaintiffs were not entitled to receive overtime compensation; (3) if plaintiffs are not entitled to liquidated damages, whether plaintiffs are entitled to prejudgment interest or whether Neb. Rev. Stat. § 45-103.04 (Reissue 1988) precludes an award of prejudgment interest; and (4) whether the Department of Labor's interim final rule effective September 6, 1991, affects this Court's June 17, 1991, summary judgment in favor of plaintiffs.[2]

---

[2] In the pretrial order, the City of Omaha also posited that plaintiffs' failure to comply with Neb. Rev. Stat. §§ 14-804, *et seq.*, bars plaintiffs' cause of action and that plaintiffs are not entitled to attorney's fees. However, because the City has failed to brief these issues, the Court will deem them as having been

Subsequent to the Court's entry of partial summary judgment in favor of plaintiffs, the Department of Labor promulgated an interim final regulation pursuant to 29 U.S.C. § 213(a), which provides that:

> A Federal, State or local government employee ("public employee") who otherwise meets the requirements of Section 541.118 shall not be disqualified from exemption under Sections 541.1, 541.2, or 541.3 of this part on the basis that such employee is paid according to a pay system established by statute, ordinance, regulation or public policy under which the employee accrues personal leave and sick leave and, absent the use of accrued leave (because the leave has been exhausted or by the employee's choice), requires the public employee's pay to be reduced ("leave without pay") for absences, for personal reasons or because of illness or injury, of less than one work-day.

56 Fed. Reg. 45,826 (Sept. 6, 1991). Courts that have been called upon to interpret this new regulation of the Department of Labor have concluded that the regulation is substantive rather than interpretive in nature. *Alex v. State of California*, 1992 WL 146824 (E.D. Cal. March 20, 1992). *Cf. Service Employees Int'l Union, Local 102 v. County of San Diego*, 784 F. Supp. 1503, 1512 (S.D. Cal. 1992) (concluding that interim final regulation is invalid for failure to comply with the Administrative Procedure Act, 5 U.S.C. § 553).

---

waived by the defendant, and they will not be addressed by the Court.

Significantly, the Department of Labor attests to having adopted the "new" regulation in an effort to "stem any accrual of *additional* liability to State and local governments . . . ," thereby attesting the regulation's substantive nature. 56 Fed. Reg. 45,825. The Department of Labor further acknowledged that the regulation was in response to the liability imposed upon governmental bodies by virtue of the Ninth Circuit's decision in *Abshire*. 56 Fed. Reg. 45,824. As the Court concludes that the regulation is clearly substantive rather than interpretive in nature, it is not retroactive and has no bearing upon the back-pay compensation due plaintiffs prior to the enactment of the regulation.

Turning next to the question of back-pay due plaintiffs, Stipulation No. 1 establishes that plaintiffs are entitled to the following amounts for uncompensated scheduled overtime:

Employee	Scheduled Overtime Back-pay
McDonnell	$2,448.25
Warsocki	2,827.81
Dineen	1,828.61
Beers	1,740.90

(Exhibit A).

Stipulation No. 2 further establishes that plaintiffs are entitled to the following amounts for unscheduled time relative to staff meetings:

Employee	Staff Meeting Back-pay
McDonnell	$ 574.82
Warsocki	403.97
Dineen	536.42
Beers	170.06

(Exhibit B).

Finally, in Stipulation No. 3, the parties have agreed that plaintiffs are entitled to the following amounts for unscheduled overtime relative to third alarm activities:

Employee	Third Alarm Back-pay
McDonnell	$ 334.32
Warsocki	715.64
Dineen	1,705.65
Beers	251.61

(Exhibit C).

The Court must next determine whether plaintiffs are entitled to liquidated damages. The FLSA provides that an employer who violates the minimum wage or maximum hour provisions shall be liable for the payment of wages lost and an equal amount of liquidated damages. 29 U.S.C. § 216(b). Liquidated damages are not penal in nature but, rather, constitute compensation for the retention of a workman's pay which might result in damages

too obscure and difficult to prove or estimate other than by liquidated damages. *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945). As a result, in an FSLA case, double damages are the norm, single damages are the exception. *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

Although the FLSA makes the award of liquidated damages mandatory, Congress created an exemption whereby the Court has discretion not to award liquidated damages if the employer shows that the act or omission giving rise to such action was in good faith and that it had reasonable grounds to believe that its act or omission was not a violation of the Fair Labor Standards Act, 29 U.S.C. § 260. *Cross v. Arkansas Forestry Com'n*, 938 F.2d 912, 917 (8th Cir. 1991). To benefit from this exception, the employer must pass both a subjective and an objective test. *See* 29 C.F.R. § 790.22(b) (the employer must show that the act or omission giving rise to such action was in good faith and must also show that it had reasonable grounds for believing that the act or omission was not a violation of the act). *Accord Cross*, 938 F.2d at 917.

In attempting to avoid the imposition of liquidated damages, the City has submitted Stipulation No. 4 as evidence of its good faith belief that it did not attempt to evade its responsibilities under the FLSA. In Stipulation No. 4, the parties agreed that plaintiffs and other City employees had the option, in instances of taking absences (whether a day or less or more than a day), of utilizing available paid leave or taking unpaid leave. Furthermore, the parties have stipulated that the plaintiffs, when taking these absences, had sufficient paid leave available to them and opted to use paid leave rather than take unpaid

leave. Plaintiffs were compensated for these absences pursuant to a system established by the City which allows for the use of paid leave time, and plaintiffs never suffered any actual diminution in their compensation as a result of any absences from work, of whatever duration, during any times material to this litigation.

However, the Court concludes that Stipulation No. 4 does not establish that the City believed it was acting in accordance with the mandates of the FLSA. Rather, Stipulation No. 4 does nothing more than establish that rather than being forced to take leave without pay, the plaintiffs had available to them an option of using accumulated annual time. Such a system does not belie the fact that plaintiffs were subjected to a system of compensation inconsistent with the FLSA. It was only through mere providence that plaintiffs fortunately had sufficient annual leave to prevent an actual diminution in their pay. While it may be arguable that the City's system of allowing plaintiffs to utilize accumulated annual leave rather than lose pay is fair, it has no bearing on whether the City believed it was in compliance with the FLSA. Interestingly, in attempting to establish that its policy of requiring plaintiffs to take annual leave for absences of less than a day was executed in good faith compliance with the FLSA, the City does not address the scenario of when a party is forced to take uncompensated leave but has no accumulated leave time. In sum, the Court finds that the City has failed to establish that it believed it was in compliance with the Fair Labor Standards Act when it required plaintiffs to take annual leave for absences of less than a day. As such, the Court concludes that plaintiffs are entitled to liquidated damages in an amount

equal to the back-pay they are due pursuant to Stipulation Nos. 1, 2, and 3. An award of liquidated damages obviates the need to discuss prejudgment interest in this case. *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945).

Plaintiff seeks recovery of attorney fees and costs. 29 U.S.C. § 216(b) provides in part:

> The court * * * shall, in addition to any judgment awarded to the * * * plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Defendant has not argued to the contrary in its brief. The Court finds plaintiffs are entitled to recover a reasonable attorney's fee and the costs of this action. An order in conformity with this memorandum opinion will issue this date.

DATED this 11th day of August, 1992.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM,
Chief Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

WILLIAM C. McDONNELL, et al., Plaintiffs,	)	CV. 90-0-17
v.	)	ORDER
CITY OF OMAHA, Defendant.	)	(Filed Aug. 11, 1992)

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Judgment is entered in favor of plaintiffs and against the defendant City of Omaha in the following amounts:

William C. McDonnell	–	$6,714.78
Robert J. Warsocki	–	7,894.84
Michael Dineen	–	8,141.36
Verne Beers	–	4,325.14

together with a reasonably [sic] attorney's fee, and the costs of this action.

2) Plaintiffs shall file an application for attorney's fee supported with proper affidavits and exhibits on or before August 25, 1992, and defendant shall file its response, including objections, on or before September 8, 1992. It if [sic] becomes necessary to schedule a hearing

for evidence or oral argument, the Court will set such hearing after receipt of plaintiffs' application and defendant's response.

DATED this 11th day of August, 1992.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

APPENDIX F

29 U.S.C. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

APPENDIX G

29 U.S.C. § 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USCS §§ 206, 207] shall not apply with respect to –

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or
>
> * * *

APPENDIX H

29 U.S.C. § 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action, Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 USCS § 215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or

on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS § 217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§ 206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS § 215(a)(3)].

* * *

APPENDIX I

§ 541.1 Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13(a) (1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided,* That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

APPENDIX J

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against

the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions where being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch

manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provisions that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is

inconsistent with employment on a salary basis within the meaning of the regulations.

APPENDIX K

Sec. 19. Compensation; increase when; extra compensation to public officers and contractors prohibited; retirement benefits; adjustment. The legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, except that retirement benefits of retired public officers and employees may be adjusted to reflect changes in the cost of living and wage levels that have occurred subsequent to the date of retirement, nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature, be increased or diminished during his term of office except that, when there are members elected or appointed to the Legislature or officers elected or appointed to a court, board, or commission having more than one member and the terms of one or more members commence and end at different times, the compensation of all members of the Legislature or of such court, board, or commission may be increased or diminished at the beginning of the full term of any member thereof. Nothing in this section shall prevent local governing bodies from reviewing and adjusting vested pension benefits periodically as prescribed by ordinance.

The surviving spouse of any retired public officer, agent, or servant, who has retired under a pension plan or system, shall be considered as having pensionable status and shall be entitled to the same benefits which may, at any time, be provided for or available to spouses of other public officers, agents, or servants who have retired under such pension plan or system at a later date,

and such benefits shall not be prohibited by the restrictions of this section or of Article XIII, section 3 of the Constitution of Nebraska.

Supreme Court, U.S.
FILED
FEB 1 1994
OFFICE OF THE CLERK

No. 93-890

In The

Supreme Court of the United States

October Term, 1993

WILLIAM C. McDONNELL, ROBERT J. WARSOCKI, MICHAEL DINEEN, DON E. BRUNKEN and VERNE BEERS,

Plaintiffs/Petitioners,

vs.

THE CITY OF OMAHA, NEBRASKA,

Defendant/Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

KENT N. WHINNERY
Deputy City Attorney
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, Nebraska 68183
Telephone: 402/444-5115
Attorney of Record for Respondent

THOMAS O. MUMGAARD
Assistant City Attorney
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, Nebraska 68183
Telephone: 402/444-5115
Attorney for Respondent

QUESTIONS PRESENTED

The respondent believes the questions presented by the petitioners do not accurately reflect the conclusions reached by the Circuit Court. Respondent submits the following questions are presented by this petition for writ of certiorari:

I. DO ADMINISTRATORS OR EXECUTIVES WHO ARE PAID A SET AMOUNT EACH MONTH, REGARDLESS OF THE HOURS THEY WORK, LOSE THEIR STATUS AS SALARIED EMPLOYEES WHO ARE EXEMPT FROM THE OVERTIME REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT SOLELY BECAUSE THEY MUST OFFSET TIME AWAY FROM THE JOB WITH ACCUMULATED LEAVE BENEFITS BUT FACE NO REDUCTION IN COMPENSATION?

II. SHOULD THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT BE INTERPRETED TO RECOGNIZE THE PUBLIC ACCOUNTABILITY CONSIDERATIONS THAT RESTRICT PUBLIC EMPLOYMENT AND TO REACH THE ACT'S INTENT?

III. IS REVIEW ON CERTIORARI APPROPRIATE WHEN PERTINENT REGULATIONS UNDERLYING THE APPEALS COURT DECISION HAVE BEEN ALTERED TO ELIMINATE FUTURE CONTROVERSIES?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT AND SUMMARY OF THE ARGUMENT..... 3

I. THE EIGHTH CIRCUIT'S DECISION IS BASED UPON THE FACTS OF THIS CASE AND IS DISTINGUISHABLE FROM DECISIONS OF OTHER CIRCUITS. SUFFICIENT CONFLICT DOES NOT EXIST TO WARRANT REVIEW ON CERTIORARI 4

II. THE EIGHTH CIRCUIT'S DECISION RECOGNIZES THAT THE LITERAL TERMS OF THE REGULATION'S SALARY TEST DO NOT LEAVE ROOM FOR THE PRINCIPLES OF PUBLIC ACCOUNTABILITY WHICH INHERENTLY RESTRICT A PUBLIC EMPLOYER. THE RULING DOES NOT ALLOW ABUSE OF THE EMPLOYMENT RELATIONSHIP BUT MERELY PERMITS CONTINUATION OF A LONG-STANDING PRACTICE THAT FAVORS BOTH THE EMPLOYEE AND THE PUBLIC..... 10

III. AMENDMENTS OF PERTINENT REGULATIONS ADOPTED AFTER THE GRANT OF SUMMARY JUDGMENT HAVE ALTERED THE REGULATORY FRAMEWORK AND HAVE REDUCED THE PRECEDENTIAL VALUE OF THE EIGHTH CIRCUIT'S DECISION. ANY SUPREME COURT DIRECTION GIVEN IN THIS CASE WILL, IN THE NEAR FUTURE, BE OF NO IMPORT..... 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied 498 U.S. 1068 (1991) 4, 5, 7, 8, 9, 11, 14

Kinney v. District of Columbia, 994 F.2d 6 (1993) 9

Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993) 7

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 388, 393 (1923) 10

McMonagle v. Northeast Women's Center, Inc., 493 U.S. 901 (1988) 9

Mich. Assoc. of Governmental Employees v. Mich. Dept. of Corrections, 992 F.2d 82 (6th Cir. 1993) 8

OTHER AUTHORITIES

29 U.S.C. § 202 12

29 U.S.C. § 255(a) 15

29 C.F.R. § 541.5d 1, 12, 14

57 Fed. Reg. 37667 12

52 Stat. 1060 12

Supreme Court Rule 10.1 16

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the constitutional provisions and regulations identified in the petition for writ of certiorari, the respondent believes the following regulation adopted after the date summary judgment was granted must be considered in reviewing the petition for writ of certiorari.

29 C.F.R. section 541.5d (1993).

§ 541.5d *Special provisions applicable to employees of public agencies.*

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because –

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify

> the employee from being paid 'on a salary basis' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Effective September 18, 1992.

STATEMENT OF THE CASE

The respondent, the City of Omaha, accepts Petitioner's Statement of the Case with the following corrections:

The district court, in its order granting the assistant chiefs summary judgment, incorrectly stated that "The City does not dispute that plaintiffs are subject to a reduction in pay for absences of less than a day." (A.17). However, there was no evidence before the court that the monetary pay of any assistant chief was ever reduced for absences of less than one day or was "subject to" reduction as that term is properly to be construed. The City had expressly denied plaintiffs' allegation that the City's policies violated the FLSA overtime requirements. (JA.5, ¶ 3). The sole evidence before the court was that the assistant chiefs at all pertinent times were paid a set amount and their monetary pay could be reduced only if they had no accumulated leave to offset an absence. (JA.9, 12).

During the trial, the district court received a stipulation that no assistant chief had ever had his pay reduced as a result of an absence from work. That is, the City's policies had never actually resulted in a reduction of pay for absences from work. In its decision reversing the

district court's imposition of liability, the Circuit Court noted the assistant chiefs disputed whether this stipulation could be considered in determining the City's liability for overtime pay. However, the Circuit Court did not rely upon the stipulation concerning the history of the assistant chiefs' pay. Instead, the Eighth Circuit found the evidentiary record which was available at the time of the summary judgment motions established that reduction of the predetermined salary was only contingent. (A.7).

The Eighth Circuit did not base its decision upon the fact that the assistant chiefs had suffered no deduction in pay. The decision was based upon the Court's view that a deduction of accumulated leave is not a deduction in pay and the potential for loss of monetary pay in the absence of accumulated leave does not, alone, make a salaried employee's pay "subject to" deduction. (A.6).

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

The decision of the Eighth Circuit is based upon the distinguishable facts of this case and the cases which petitioners contend present conflicting opinions and authority. The distinguishable factual bases for the decisions make review on certiorari inadvisable. Further, the decision does not create different overtime rules for public and private employers but simply recognizes the oftentimes distinct pay and leave systems in the private and public employment environs. The decision simply recognizes the principles of public accountability that restrict the pay and leave systems of public employers. It

does not leave public employees unprotected and subject to abuse, but, rather, permits an essential protection of public employees' pay to continue. In addition, the administrative regulations underlying the Eighth Circuit's decision have been changed in their application to public employers and the precedential value of any decision after review would be minimal and short-lived.

I.

THE EIGHTH CIRCUIT'S DECISION IS BASED UPON THE FACTS OF THIS CASE AND IS DISTINGUISHABLE FROM DECISIONS OF OTHER CIRCUITS. SUFFICIENT CONFLICT DOES NOT EXIST TO WARRANT REVIEW ON CERTIORARI.

The petition for certiorari is based upon differing conclusions by circuit courts. The petitioners principally rely upon the decision from the Ninth Circuit Court of Appeals in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991), and decisions following that case. While the courts have certainly taken different approaches to construing the regulations governing the FLSA exemption for executive, administrative, and professional employees, the Eighth Circuit decision does not add to any existing conflict. The Eighth Circuit distinguished its decision in this case from the Ninth Circuit's decision in *Abshire*, supra. This case does not present any additional conflict of established law among the circuits that must be resolved.

A close reading of the Eighth Circuit's decision shows the situation the court faced was factually distinguishable from the evolving body of law represented by the *Abshire* decision. The decision here does not establish

any inflexible rule necessarily in conflict with the decisions of other circuit courts. The Eighth Circuit court said:

> Although the City's pay system is similar to that in *Abshire*, the systems are factually distinguishable. In *Abshire*, the county paid battalion chiefs overtime pay for every tenth of an hour they worked beyond their regularly scheduled work hours, and usual hourly rates for their attendance at training activities outside their work shifts. 908 F.2d at 485. This policy, alone, the Ninth Circuit observed, is inconsistent with salaried status. . . . In our view, the overtime compensation policy in *Abshire* severely limits its persuasive weight. The City does not have such an overtime compensation policy here; the chiefs are paid a predetermined amount regardless of hours worked.

999 F.2d at 296-7. The Eighth Circuit simply distinguished *Abshire* on the facts and, implicitly, its progeny, and was not persuaded the rule of *Abshire* was applicable in this case.

More specifically, the Eighth Circuit's decision distinguished the Department of Labor letter ruling relied upon by the Ninth Circuit in the *Abshire* decision. Instead of accepting the interpretation of a letter ruling that is general in scope and application, the Eighth Circuit looked to letter rulings explicitly applicable to public employees. The Eighth Circuit explained:

> The letter ruling quoted in *Abshire* and relied on by the district court states only that deductions from pay for absences of less than a day are inconsistent with section 541.118. . . . There are

> other Department of Labor, Wage, [sic] and Hour Division letter opinions that relate specifically to public employers and provide guidance.

999 F.2d at 297. Here, the question was whether a public employee's contingent, possible reduction in pay would be consistent with section 541.118. The letter rulings on which the Eighth Circuit relied suggested section 541.118 addresses only those deductions which are certain to follow from a reduction in pay due to quantity or quality of work. This refinement of the view expressed in Department of Labor letter rulings factually distinguishes this case from the line of cases based on *Abshire* and avoids the critical conflict between the circuits that might warrant Supreme Court review on certiorari.

The decision, here, does not establish a rule saying that an employer can reduce the compensation of an employee and retain the employee's exemption from overtime regulations. Nor does the decision mean, as the petitioners suggest, that an overtime claimant must establish that pay has *actually* been reduced. It merely holds that, when section 541.118 speaks of pay which is "subject to deduction", that section does not mean pay that would be deducted only if several contingencies align. Whether any particular employee's pay had ever actually been reduced due to an absence of less than a day was not a basis for the decision.

The Circuit Court did not rely upon the stipulation that the compensation of these assistant fire chiefs had never actually been reduced due to an absence of less than one day. The Court held that the evidence in the record at the time of the district court's grant of summary

judgment, i.e., the evidence without the subsequent stipulation, was sufficient to establish that the assistant chiefs were paid a predetermined amount and that reduction of that amount depended on a number of contingencies. The Court merely noted the stipulation that the chiefs had suffered no actual loss of pay as an aside. Id. at 296. Actuality of loss is a part of the decision only as a factor affecting the probability of a deduction, i.e., whether a deduction is contingent or certain. Actuality of loss is not a part of the decision as a necessary element of proof.

Petitioners incorrectly contend that the Circuit Court decision holds that the policy must actually result in diminished pay. The decision is more appropriately read as holding only that the policy must result in diminished pay as a necessary result of reduced work. Reductions for other reasons is not sufficient.

Similarly, the decisions from the 7th Circuit, 6th Circuit, and D.C. Circuit are factually distinguishable from the instant case. In *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993), the Court found an actual deduction in pay had occurred because of improper suspensions that resulted in a decreased quantity of work. The Court found that the pay was actually subject to deduction, rather than contingently subject to deduction, as there had been a direct loss to the employee. Further, as in *Abshire*, the employer had treated the employee as an hourly employee and had paid the employee overtime pay. This conduct indicated the true nature of the employee's status with the employer. The combination of compensation for increased work time and the loss of pay from the

improper discipline procedure was critical to the decision. None of these factors are present in the case before this Court.

In *Mich. Assoc. of Governmental Employees v. Mich. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993) the Sixth Circuit distinguished *Abshire* and decided the case based on factual issues rather than any general rule of law. The Sixth Circuit looked to the past practice of not reducing the employees' pay to determine, as a factual issue, what was the actual policy. The state contended that the policy the employees claimed subjected their pay to deduction was used only when absences of more than eight hours occurred. The Sixth Circuit, in dicta, speculated that it might be sufficient that the employee had "been affected" by the leave policy rather than to look for whether the employee's pay had been reduced by the policy. Id. at 86. But, the case turned upon an issue not present here. As the Court said: "In this case, the true nature of the policy is the crux of the dispute." Id. at 86. The Sixth Circuit found the actual use of the policy to be relevant in that it "may shed more light on the actual policy than an ambiguous excerpt from an employee manual. In this case, the fact that no plaintiff's pay has ever been reduced for absences of less than one day supports the defendant's interpretation of its own sick leave policy." Id. at 86. The Sixth Circuit's decision does not establish any rule in conflict with the Eighth Circuit's decision, here.

The Sixth Circuit's discussion actually sheds light on the Eighth Circuit's conclusions. The actual application of the City of Omaha's policy was relevant not to show directly whether the employees were or were not exempt from overtime requirements. Instead, the Eighth Circuit

saw the actual application of the policy as relevant evidence of the extremely contingent nature of the possible deduction permitted by the City's policy. The Eighth Circuit simply recognized that deductions in pay were unlikely and held that such an extremely contingent policy should not be the basis for changing a salaried executive into an hourly worker.

Similarly, the D.C. Circuit faced a factually distinguishable circumstance in *Kinney v. District of Columbia*, 994 F.2d 6 (1993). In that case, the fire fighters had, as in *Abshire*, been treated by the employer as hourly employees. The fire fighters had been compensated for overtime hours by the hour and were required to keep detailed timekeeping records of their overtime hours. These pertinent facts independently suggested hourly employee status quite apart from the nature of the benefits which were reduced. In addition, the D.C. Circuit refused to consider the employer's contention that the Labor Department regulations as interpreted in *Abshire* were inconsistent with the Congressional intent underlying the Fair Labor Standards Act and effectively negated the salaried employee exception for public employers. The argument was first raised on appeal and the Court would not entertain this challenge.

This Court's discretion in granting certiorari has traditionally been exercised only when essential to secure uniformity within the federal court system. Certiorari is granted only when the principles involved are important to the public and a real conflict exists between the courts of appeals. Differing results in similar cases is, alone, not sufficient to justify review on the merits. See, *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901 (1988)

(White, dissenting from denial of cert.). The Court has said:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 388, 393 (1923). The cases cited by petitioner in support of granting the writ of certiorari are sufficiently distinguishable on their facts; they do not present a real and embarrassing conflict of opinion and authority. The differing results in these cases do not warrant the exercise of this Court's discretionary review.

II.

THE EIGHTH CIRCUIT'S DECISION RECOGNIZES THAT THE LITERAL TERMS OF THE REGULATION'S SALARY TEST DO NOT LEAVE ROOM FOR THE PRINCIPLES OF PUBLIC ACCOUNTABILITY WHICH INHERENTLY RESTRICT A PUBLIC EMPLOYER. THE RULING DOES NOT ALLOW ABUSE OF THE EMPLOYMENT RELATIONSHIP BUT MERELY PERMITS CONTINUATION OF A LONGSTANDING PRACTICE THAT FAVORS BOTH THE EMPLOYEE AND THE PUBLIC.

The petitioners incorrectly assert that the decision of the Eighth Circuit drives a wedge between the protection available to public employees and that afforded to employees of the private sector. The petitioners warn that

the decision allows public employers to abuse their employees. The petitioners exaggerate the effect of the Eighth Circuit's ruling.

The ruling does not, by its terms, apply only to public employers or employees. The ruling simply recognizes that the principles underlying the proper analysis of the administrative regulations in this case are unique to public employers. The Eighth Circuit simply recognized that the Ninth Circuit's decision in *Abshire,* supra, and its progeny have attempted to apply rules written for private employment to a different employment environment; i.e., the public employer. However, the court's acceptance of the differing employment environments does not "drive a wedge" between the employees in these environments.

The Eighth Circuit disagreed with the Ninth Circuit's reliance on a letter ruling that is general in its terms. Instead, the Eighth Circuit concluded that Department of Labor letter opinions specifically addressing the work environment of public employers provided more guidance in ascertaining the intent of the regulations. The Circuit concluded these letter opinions "demonstrate the administrative interpretation of the regulations before us." (A.11).

The Circuit Court also recognized that "the salary basis test was promulgated long before the FLSA applied to public employees and the Ninth Circuit's strict interpretation of the salary basis test fails to consider the difference between public and private sector employees." (A.11). The FLSA was a depression-era measure intended by its drafters "to correct and as rapidly as practicable to eliminate" certain "labor conditions detrimental to the

maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. As originally adopted, the FLSA regulated only private sector employers. See, FLSA § 3, 52 Stat. 1060. The "salary basis" test of 29 C.F.R. Part 541 was first promulgated in 1949, seventeen (17) years before Congress first applied the FLSA to any state or local employee and was written in light of the compensation practices of private sector employers. It did not attempt to consider the distinct working patterns and payment methods of government entities. The test had no reason to consider the unique responsibility of government employers to account to the electorate in some tangible fashion for the time actually spent on the public's business. (For discussion of the history of the professional, executive, and administrative employee overtime exemption in the public workplace, see, 57 Fed. Reg. 37667-37671).

The Eighth Circuit's decision reconciles this history with the traditional civil service precepts which limit the leave systems fashioned by public employers. Government is almost universally restricted from paying public funds when it has not received services in return. This restriction is based on considerations of fiscal integrity and protection of the public trust. The practice is based on sound public policy which requires that public sector pay systems be analyzed differently from private employers' pay systems. The systems have significant distinctions and serve significantly different purposes.

Because of the burden this "pay only for work" principle would place on employees who must take time away from their jobs for personal reasons, leave systems

were created to protect an employee's compensation for periods when the employee does no work. The leave systems protect the employee from a loss of monetary pay. Paid leave, instead of acting merely as another form of "pay" which can be deducted and lost to an employee absent for less than a day, is a benefit that insulates the employee from variances in the employee's pay due to absences. Leave with pay is relied upon as a protection for employees who otherwise could not be paid during an absence. Instead of causing a reduction in pay, the public sector leave programs guarantee that the employee will not suffer deductions in pay for absences from the job. The paid leave insures that the employee will continue to be paid even if there are periods of no performance. The petitioners' reasoning turns this shield into a sword.

Few public employers' compensation plans will meet the standard proposed by the petitioners. The proposed standard threatens a stable and uniform pay and benefits package. A government employer should not, as a matter of fundamental fairness, be denied an overtime exemption available to its private sector counterparts simply because the source of the government employer's funds requires a more carefully monitored and accountable approach than is typically applied to the employer who pays wages from private money.

The compensation system for public employees at issue here reflects the differences that traditionally have been found in public and private employment. When used in public employment, the system serves both the public and the public employee. But these principles of accountability need not be exclusive to the public

employer. Leave policies that act to protect the employee's continued pay may also be found in the private sector. In factually similar private sector circumstances, the principles underlying the Eighth Circuit's decision would equally apply. The decision creates no "wedge" driving apart the protections afforded to public or private sector employees.

III.

AMENDMENTS OF PERTINENT REGULATIONS ADOPTED AFTER THE GRANT OF SUMMARY JUDGMENT HAVE ALTERED THE REGULATORY FRAMEWORK AND HAVE REDUCED THE PRECEDENTIAL VALUE OF THE EIGHTH CIRCUIT'S DECISION. ANY SUPREME COURT DIRECTION GIVEN IN THIS CASE WILL, IN THE NEAR FUTURE, BE OF NO IMPORT.

The Eighth Circuit's ruling is based upon the salary-basis test expressed in the administrative regulations at 541.118. The Department of Labor, Wage & Hour Division, reacted to the line of cases developing after the *Abshire* decision by adopting new regulations addressing the very principle the City submits must be applied to public employers. Effective September 18, 1992, the Department of Labor adopted a rule which provides that public employees who otherwise qualify as salaried employees exempt from FLSA overtime requirements will not lose their exempt status solely because their pay may be reduced in accordance with a leave system like the system at issue here. 29 C.F.R. § 541.5d now provides:

> (a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under

> §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because –
>
> (1) permission for its use has not been sought or has been sought and denied;
>
> (2) accrued leave has been exhausted; or
>
> (3) the employee chooses to use leave without pay.
>
> (b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid 'on a salary basis' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Claims for overtime pay entitlements under the FLSA based on other than willful violations must be brought within two years of the date the claim accrued. Claims based upon willful violations must be brought within three years of the date the claim accrued. 29 U.S.C. § 255(a). Thus, public employees facing a leave system similar to that faced by the petitioners can accrue no claims for overtime as a result of the leave system after September 18, 1992, and any claims accruing before that

date will be lost by passage of time no later than September 18, 1995. The decision of the Eighth Circuit in this case, and any decision on the merits announced by this Court, will have little precedential value after the claims now accrued are adjudicated.

When exercising its appellate jurisdiction, this Court should recognize any change in law which will lessen the value of Supreme Court review. Review on writ of certiorari is a matter of judicial discretion that should be granted only when there are "special and important reasons therefor". Supreme Court Rule 10.1. This Court should avoid using its scarce judicial resources to review decisions which, with the passage of time, will quickly lose their impact on the general public.

This Court need not review this decision. The public importance of this decision will rapidly fade. Any decision on the merits would lose its significance within a short period of time after it could be announced. For this reason, alone, the judicial resources of this Court should not be wasted on reviewing this decision.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

CITY OF OMAHA,
Respondent

KENT N. WHINNERY
Deputy City Attorney
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, NE 68183
Telephone: (402) 444-5115
Counsel of Record
for the Respondent,
The City of Omaha

THOMAS O. MUMGAARD
Assistant City Attorney
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, NE 68183
Telephone: (402) 444-5115
Attorney for Respondent